THE TWENTY-SEVEN YEARS' LITIGATION

BETWEEN THE

VERMONT CENTRAL

AND

VERMONT AND CANADA RAILROADS

VERMONT BAR ASSOCIATION

ADDRESS OF MAX L. POWELL

October, 1907

Montpelier, Vt.,
Argus and Patriot Press.
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Mr. President and Gentlemen of the Vermont Bar Association:

It is unfortunate that this historical sketch could not be written by one who was an actor in the drama who could give to the narrative the personal and biographical touch. But history is seldom written in the making. The nearness of the view often distorts the perspective and the man best fitted to undertake the task often shrinks from the candid criticism of his fellows and times, knowing that his candor is likely to be set down as rancor; his frank portrayal, as a chance to "even up the score".

The man of all others, whose trenchant pen would have hit the mark with unerring aim is Hon. B. F. Fifield who was leading counsel for the Central Vermont road and its receivers for thirty years from 1869 to 1899. So in writing this I am simply a substitute for a better man but I prefer this kind of substitution to the Chinese method of which I recently learned.

An absent minded missionary in making an address said: "In China, dear friends, a man's life is ranked as of but slight value. Indeed, if a wealthy Chinaman is condemned to death, he can easily hire another to die for him; and I believe many poor fellows get their living by thus acting as substitutes."

The history of the litigation in question dates from April 1855. At that time the Vermont and Canada Railroad Company brought its bill in chancery against the Vermont Central Railroad Company and others

who were bondholders of said railroad, the principal allegations of the bill being as follows:

The Vermont & Canada Railroad will be spoken of as the "orator" and the Vermont Central Railroad Company as the "defendant".

The bill sets forth that the orator was incorporated October 31st, 1845, and the defendant October 31st, 1843; that certain articles of agreement were duly entered into by these corporations on the 24th of August, 1849, the 11th of January, 1850 and the 9th of July, 1850. The agreement of August 24th was in terms a lease from the orator to the defendant of the orator's entire road as then constructed and thereafter to be constructed and completed. The orator agreed to proceed with all dispatch to construct and finish its road conformably with its charter and in a manner satisfactory to the directors of the defendant. The agreement also provided that if the defendant should at any time after twenty years from the opening of the orator's road elect to purchase said road, it might do so upon payment to each stockholder of the par value of his share. The annual rental was fixed at a sum equal to eight per cent annually upon the amount of the whole cost of said road, including buildings, fixtures, lands and appurtenances. The agreement of January 11th referred to simply changed the twenty years to fifty years the period within which the defendant might, on the terms specified, purchase the orator's road. The agreement of July 9th provided that if for any reason the defendant should fail to pay the rent stipulated, in order to prevent embarrassment and interruption in the working of the road, whereby the public interests would be prejudiced, the orator, in default of said payment of rent for the space of four months, might enter,

take possession of, use and operate both railroads and when the income receivable from both roads after paying all reasonable expenses of running and working the roads, should be sufficient to pay the rent then in arrears, then the defendant should have the right to resume possession and control of both of said roads in accordance with the terms of the original lease. This agreement further provided that when the orator shall have finished its road then it shall have no further right to expend money on said road, but the defendant shall have the right to expend such amount of money in the improving and perfecting said road as it may find necessary and convenient for the more perfect enjoyment of said road, but said expenditure is not to be charged to the orator; and it was further provided that in case it shall become necessary for the orator, in order to comply with its charter, to extend its road into the Village of Burlington, the said orator agrees to lease unto the defendant such portion of its road under the same conditions as applied to the other portions of its road.

The bill further alleges that the orator, in pursuance of said agreement, constructed and completed its road from Rouses Point to Essex Junction and the defendant took possession thereof in the Fall of 1850, and since, either by themselves or by trustees appointed, have managed and run that road in connection with its own road down to the date of the bill; that the cost of construction of the orator's road prior to June 1st, 1853, was $1,350,000, and that a rent of $108,000, annually, had been paid by the defendant company or its trustees down to January 1st, 1854, but that no rent had been paid since that time; that on November 1st, 1851, the defendant issued its bonds to the amount of $2,000.

000, dated November 1st, 1851, and payable in ten years from date and executed a mortgage of their road, franchises and personal property to three persons in trust for such bondholders; that at the time of the bringing of this bill, the defendants John Smith, William Raymond Lee and John S. Eldridge were trustees under said mortgage and that the other defendants were holders of the bonds and were made parties to represent such holders; that on the 28th of June, 1852, the defendant, by deed duly executed, surrendered possession of all the property and franchises conveyed in said mortgage to the trustees above named, and said trustees took possession of the property and continued in the possession and management down to the date of the bill; that since the failure to pay the rent due the orator on December 1st, 1854, the orator has requested the said trustees to surrender to it the possession of the two railroads under their charge in accordance with the agreement set forth in the bill; that the trustees had wholly refused so to do.

The bill also sets forth the issue by the defendant company of their bonds and the execution by them of the second mortgage to secure the same to certain trustees named in the bill.

The prayer of the bill was that the defendant company and the said trustees, Smith, Lee and Eldridge, be ordered and decreed by the court to pay to the orator forthwith the amount of the rent payable on December 1st, 1854, and that in the meantime and until such rent is paid that the said trustees be ordered to allow the orator to enter and take possession of and use and run both railroads and to apply the residue of the receipts after reasonable expenses had been paid toward the payment of all rent in arrears or which might become due while the orator was in possession, or if it should

not seem fit to the Court to make such order, that the Court appoint some suitable or responsible person or persons to be receiver or receivers and manager or managers of the said roads. The answer of the defendant admitted the legality and binding force of the lease and agreement set forth in the orator's bill, but denied the right of the orator to take possession of the road and claimed that the agreement of July 9th, 1850, was illegal and invalid.

The cause was referred to special masters to ascertain and report the cost of the construction of the orator's road together with the incidental expenses of that company and the amount of rent in arrears due them.

The case came on for hearing at the April Term, 1860, before Judge Poland, Chancellor, who entered a decree for the orator in accordance with the prayer of the bill and ordered that the two roads be kept in the hands of receivers and subject to the control of the Court. The receivers appointed were Lawrence Brainard, Joseph Clark and John Gregory Smith, three of the keenest business men Vermont has ever produced.

From this decree both parties appealed and the case was tried in the Supreme Court of Vermont and reported in volume 34, 1 to 68. The defendant contended before the Supreme Court that a corporation had no right to make a contract to forfeit its own existence, or put its control in the possession of another corporation; that corporations created for particular purposes with limited powers cannot by their own inherent contracting powers enlarge their charters and extend their business beyond the scope of their original charters.

The defendant admitted the right to pledge tolls of the two roads to the payment of the rent under the lease, but claimed it was *ultra vires* for it to enter into

any arrangement to forfeit its existence. The defendant also claimed that the non-completion of the orator's road in time subjected the orator's charter to forfeiture and having by its own act incurred the forfeiture it cannot ask the court of equity to deliver possession of property in pursuance of the contract thus violated on its part and allow it to perform and execute the contract on the part of the defendant. The defendant also contended that the Court should retain control of the property and administer the trust for the benefit of all concerned. On the question of *ultra vires* the Supreme Court, in the opinion handed down at the January Term, 1861, held that a corporation has only such powers as are conferred by the power that has created it. By the original acts of incorporation, neither of the parties were endowed with the power to enter into such contracts of lease and security as were made in this case. That if this case stood only upon the original acts of incorporation the contracts of lease and security would be subject to impeachment for invalidity by parties sustaining such a relation to either of the companies and to the contracts as entitled them to question their validity. The Court made a distinction between contracts that were in violation of law or contrary to public policy and contracts that were invalid from the want of capacity to make them. A contract of the latter character could be questioned only by the immediate parties to it such as the corporations themselves or the stockholders. If a contract is in violation of some public law or against public policy, any person standing in the relation of interest to the subject matter might raise the question of the validity of the contract. The original acts of incorporation of the two railroad companies did not provide for such contracts of lease and security as were

made in this case, but they did not in terms prohibit them. The Legislature by the act of 1847, Section 34, provided in terms that "all railroads incorporated or which may be incorporated under the authority of this State shall have power to make contracts and arrangements with each other for leasing and running their roads or any part thereof" etc. This act was clearly intended to give the two railroad corporations the power to do what they did, and in addition the corporations, by the unanimous consent of every stockholder, accepted the additional powers conferred by the general law as if they had been conferred by the original act of incorporation. The Court also held that when the original charter has been acted upon by the organization of the corporation it cannot be materially altered by subsequent legislation so as to bind the corporation itself or the individual corporations without their assent; that the original charter becomes a contract mutually obligatory and that, as between the corporation and the stockholders, the stockholders have distinct individual rights and cannot be compelled to yield or forego them without their consent. In other words,while a stockholder is bound by the will of the majority within the prescribed limits of corporate power and capacity, those limits cannot be enlarged without the consent of the stockholders individually. In this case the stockholders did consent to the contract and lease at a Stockholders' Meeting called and held for that purpose on the 9th of July, 1850, and no member of either corporation either interposed any protest or dissent. This effectually disposed of the main question of *ultra vires*.

The Vermont Central Company and the trustees under the first mortgage admitted in argument the legality and binding force of the lease of August 24th, 1849,

and also of the indenture of July 9th, 1850, so far as it gave security upon the earnings of the roads for the payment of the stipulated rent. They denied the validity of the instrument as a conveyance in mortgage of the property, franchises, easements and privileges with the right of possession as being *ultra vires* and for the reason that if ever enforced it would transfer the railroad and all the property of the Vermont Central Company to the orator without consideration. This very nice question of law the Court held was not brought in issue by the record and it was not the duty of the Court to pass upon it for the reason that the defendants admitted the validity of the indenture of July 9th, 1850, as a pledge of the toll fares and the income and that was all that was necessary for the disposition of the case at that time. The argument was raised that this was not a lease, but was only a form of machinery by which the Vermont Central Company had a loan of the stockholders of the Vermont & Canada Company for an amount of money thus raised at an interest of 8 per cent, but the Court held that the interest of the Vermont Central Company was in terms a leasehold interest and that this could not be regarded as a loan as there was no obligation or duty ever to pay the principal.

The exigencies of the original situation were these:

It was most important for the Vermont Central Company that the Vermont & Canada Road should be built. The latter company in the state of the market found it impossible to dispose of its stock to a sufficient extent to raise the money necessary for the construction of its road. In order to assist the Vermont & Canada to sell its capital stock, the Vermont Central made the lease in question with a guaranteed rental of 8 per cent.

There was then no difficulty in disposing of the stock with this guaranty and with the means thus raised the road was built. As to the question of forfeiture of the orator's charter because the road was not completed in time the Court reviewed the acts of the Legislature extending the time for the construction of the road and held that a forfeiture of a corporation can only be taken in behalf of the public and by some form of proceeding to which the public by proper representation is a moving party. That the legislature had not in this case undertaken to declare a forfeiture. It was the clear understanding and design of the parties that the defendant railroad should pay rent at 8 per cent on the cost of such portions of the road as should be accepted by them. The road was constructed and accepted accordingly from Essex Junction to Rouses Point and the defendant road went into possession and use of the road and have since had the use and possession. The substantial thing was the road from Essex Junction to Rouses Point. As to the neglect of the orators to build and complete their road so as to meet the Rutland & Burlington Railroad at Burlington and to connect the same with the Canada line in Highgate within the time limited in the original act of incorporation, the Court held that whether further portions of the road be built or not is a matter to be settled between the orators and the State. If it is ever built and proffered for acceptance the defendant may then properly raise the question as to its obligation to accept the same and pay rent therefor, and its liability for the payment of rent is limited only to such parts of the road as are built and accepted by said defendant; that by the act of 1859 the time within which the road must be completed to Burlington and Highgate had not yet expired, and the Court held that the proper time

to raise that question would be when a case shall have arisen involving it. Upon the report of the masters, the Court determined in this case that the cost of construction upon which the 8 per cent was to be computed as a measure for rent was $1,348,500. The Court, in short, held that the instrument in question was a lease and valid as a pledge and lien by way of security for the payment of the stipulated rent, upon the tolls, fares and incomes of the two roads and was in priority to the claims of the trustees and bondholders. The Court refused to the orator the possession of the roads and ordered that the road and property remain in the hands of receivers under the control of the Court of Chancery. For twenty-two years after the mandate handed down in 1861 the two railroads were under the administration of the Court of Chancery in the original cause for the purpose of the execution of certain trusts in favor of the Vermont & Canada Railroad Company, the first and second mortgage bondholders of the Vermont Central Railroad Company and the Vermont Central Company and were operated during that time by managers appointed by said Court and acting under its direction. There was a compromise decree of January 19th, 1864, under which all the parties in interest agreed to a new *modus operandi*, which agreement had the sanction of the Court by a special decree. During the administration of the managers there had been issues of bonds secured by special pledges of certain equipments of the roads, the whole amount of said bonds aggregating about $4,500,000. in December, 1876. At that time the petition was filed in the original cause by the Central Vermont Railroad which was incorporated by act of the legislature in October, 1872, for the purpose of reorganizing the Vermont Central and Vermont & Canada

Railroad Companies. It was organized in the spring of 1873 and at the time of the filing of the aforesaid petition it was the receiver and manager of said roads. The petition alleged that the management of said roads, under the administration of the Court, had become "cumbersome and unwieldy", was attended with large and disproportionate expense and that the best interests of both security holders and the public demanded that such administration should be ended and the roads brought under corporate management; that the credit of the receiver and manager had been destroyed by malicious and wanton attacks in the public press and elsewhere, and the receiver and manager thereby rendered unable to borrow money necessary to the further operation of the roads; that the immediate payment of the floating debt was necessary and that the only means of raising the money was the sale of the roads and trust property, which could not be beneficially sold in parts. The petition prayed that said trust debt might be declared a charge and first lien upon both railroads and their equipments and upon all the assets and property of the receivership; that said roads, equipments and property be sold under direction of the court and that the receiver, the Central Vermont Railroad Company, be permitted to become a bidder therefor; that the Vermont Central & Vermont and Canada Railroad Companies, and the trustees of the first and second mortgages be ordered to release their interest to the purchaser. The answer of the Vermont and Canada Railroad Company to this petition admitted that the two roads had been under the management of the Court as averred in the petition; that on January 19th, 1864, by a consent decree the capital stock of the Vermont & Canada Railroad Company was increased to $2,000,000, and that by leave of the Court the capital stock of

said road was duly increased June 1st, 1872, to $3,000,000, and that was the basis of rent; that said rent and incidental expenses were in arrear in the sum of more than $1,000,000; that under the decrees of the Court, the petitionee was entitled to have said roads operated for its benefit in accordance with the terms of said decrees.

The answer denied that the debts incurred by the receivers constituted a valid lien on said roads or the property thereof in priority to the petitionee's lien. The answer admitted that the Central Vermont Raiload Company was incorporated for the purpose of enabling those interested in the property to consolidate their interests in the corporation but alleged that it was not used for that purpose, but in the interest of those who were hostile to those who were entitled to the earnings of said roads and property.

The answer admitted that said receivers had from time to time borrowed large sums of money, but alleged that all their loans--excepting a loan for the floating debt of $2,000,000,—called first, second and third equipment loans, etc., were made for the purpose of funding the floating debt of the receivers incurred in operations undertaken by them beyond the lines and limits of the two roads—operations which they, as receivers, had no lawful right to enter into, either with or without the permission of the Court; that at about the time of the compromise decree of 1864 said Clark and Smith, two of said receivers, engaged individually in the building of the railroad known as the Montreal & Vermont Junction Railroad and became the principal owners thereof when built and that in the construction of said road they used the funds of the receivers to a large amount and have never replaced the same and that they became indebted therefor and created an indebtedness against

the receivership for their own private benefit; that in 1864 and 1865 said Clark and Smith employed funds of the receivership in obtaining control of the Stanstead, Sheffield & Chambly Railroad, being thereto induced by the advantage that would thereby accrue to the Montreal & Vermont Junction Railroad; that said receivers had met with large losses by reason of leases of the Ogdensburg & Lake Champlain Railroad, Rutland Railroad, Missisquoi Railroad and Northern Transportation Company which debts were not incurred in the legitimate discharge of the duties of the receivers; that of the debts created by them to the amount of $6,357,000, not more than $2,000,000 had been expended in the improvement of the Vermont Central Railroad and that the balance of the indebtedness had grown out of the operations of the receivers undertaken outside of and beyond the true lines of the two roads, and that said companies or the parties interested therein as mortgage bondholders should not be subjected to loss by reason of the course pursued by the receivers in violation of their duties and that the orders of the Court which justified them in their proceedings were invalid and void. The answers were traversed and testimony taken, and on June 11th, 1877, a decree was entered dismissing the petition strictly *pro forma* and without prejudice, that the questions involved might be heard by the Supreme Court on appeal.

The case came on for hearing at a special term of the Supreme Court convened for that purpose on July 24th, 1877.

The counsel for the petitioners were L. P. Poland, George F. Edmunds and B. F. Fifield, for the petitionees, C. W. Willard and A. F. Walker, and for certain first mortgage bondholders E. J. Phelps.

Judge Barrett rendered the opinion of the Court which is found in 50 Vt. 533–595 inclusive. The opinion recites the history of the case at length. The principal points are these:

After the decree of the Court of Chancery at the April term, 1861, the receivers, Brainard, Clark and Smith went on in administering the property for the purpose designated down to January 19th, 1864. On that date the famous "Compromise Decree" was made by agreement of parties interested, which agreement recites that it was made "for the purpose of settling in full all claims and demands of the Vermont & Canada Railroad Company against the Vermont Central Railroad Company, and for the purpose of closing finally the construction account of the Vermont & Canada Railroad Company" in the manner provided in the agreement.

On the 4th of November, 1863, an act of the Legislature was passed and approved which authorized the Vermont & Canada Railroad Company to convert the back rent into stock and to increase their capital stock for that purpose on such terms and conditions as the Court of Chancery should deem just and equitable. The Vermont and Canada Railroad Company petitioned the Court to give its sanction to such agreement and the Court so decreed on the ground that, no objection being made, "the carrying of said agreement into effect will be advantageous to all persons interested in said company's road and property and income."

This decree provided that the costs and expenses of the extension to Highgate should be paid by the trustees and receivers from the earnings and income from the said roads and property. Up to this time the road had been completed only from Rouses Point to Essex Junction. The decree provided that a committee

of the first mortgage bondholders and their successors should be appointed annually by such bondholders as an Advisory Board. Section 13 of the decree provided that all suits respecting said road and property should be forthwith discontinued and costs and expenses paid by said trustees and receivers out of the income of said business. It provided, lastly, that the cause in which that petition was filed should be continued on the docket of the Court of Chancery and any party in the cause might apply to the Court from time to time for further orders in the premises.

It was upon the question of the scope and legal effect of the "compromise decree" that the fighting at this time was the fiercest.

Judge Barrett, after referring to the mandate and original decree as not contemplating that the railroad and railroad property should be appropriated by sale or otherwise to the payment of the rent due to the orators but that only the income from the use of the roads and property should be thus appropriated, says:—

"From the substance of said two decrees thus presented it is easy to be seen that the decree of January 19th, 1864, was a decree by consent—the result of a deliberate agreement of the parties thereto—extending to the obtaining for it the name and assumption of being a decree in the original cause, and to be signed as such by a chancellor embracing, in the main, matters not within the scope of the bill, and not at all contemplated by the mandate of the Supreme Court and the decree made upon it and embracing matters not within the province of the Court to make the subject of decree under the original or any other bill predicated upon the relation of the parties in interest under the lease, and the first and second mortgages, at the time said decree was made. Neither the

bill, nor the court upon said bill, had anything to do with funding the unpaid rent into Vermont & Canada new stock, to draw 8 per cent interest annually, under the name of rent, to be paid out of the earnings of the said roads and property".

After the "compromise decree" the administration proceeded under and in pursuance of said decree and under it loans were paid to all entitled and interest was paid to and received by mortgage bondholders and substitution of one form of claim for another was made down to 1872, with no exception or protest on the part of any one. From the time of the "compromise decree" down to 1872, several decrees were made by the Court on petition for the purpose of funding equipment loans and for various other purposes. April 20th, 1872, there was a decree authorizing $2,500,000, notes to be issued on thirty years at 8 per cent for the purpose of paying equipment loans that had fallen due and for purchasing equipment for the lines of road recently leased by the defendant. All the decrees in this interval from 1864 down to 1872 were instituted by petition of the managers and all of the petitions were represented to the Chancellor to be amicable, to have been devised and agreed upon by those having the largest interests involved. All was done openly and some decrees were made with ample notice to all interests and some with meager notice, but all was a matter of open record and accessible to all and no one appeared with protest or objection, until the adversary litigation began in 1873.

The fruits of the receivership administration had been participated in by all in interest down to the failure to pay rents, interest and principal, which failure first occurred subsequent to the "compromise decree" in 1872. Among the obligations assumed and met by the

receivers or managers was the payment of rent to the Vermont & Canada Railroad Company, to the Ogdensburg P. R. Co., to the Rutland Railroad Company to the Northern Transportation Company, to the Missisquoi Company, also interest and principal on the first and second mortgage bonds and interest on the various loans from 1865 to 1872.

The Court held as to the decrees that had been made during this time without objection, that there could be no objection made at this time and that it was perfectly proper for the Central Vermont Railroad Company by petition in the original case to bring its petition praying for relief. The Court held that virtually and practically under the lease both roads became a single one in the permanent and perpetual proprietorship of the Vermont Central Railroad Company to have the net income applied in payment of the rent due from time to time. That all the accessories to the personal property of the railroads wherever located belonged to the Vermont Central Railroad Company; that the issuing of stock by the Vermont & Canada Railroad Company as a means of raising money to complete construction did not take money belonging to that company, but the money only of the individual persons who should buy such new stock, trusting to the credit and ability of the Vermont Central Railroad Company and its successors to pay the 8 per cent according to the lease. It was simply in effect a mode of enabling the Vermont Central Railroad Company to raise money at 8 per cent on the credit of their ability to pay.

Judge Barrett, in his opinion in the 50th Vermont, after holding that the acts of the receivers were binding upon all because of the consent, in a long and somewhat involved argument on these propositions of law,

which we will see later the Court practically overruled, maintained that the receivership was not appointed for the purpose of holding, using and preserving the property pending litigation as it had been prior to the mandate and decree of 1861, nor for the purpose of holding for sale and the realization thereon of assets with which to pay off a mortgage indebtedness and in the meantime to care for and preserve the property for the use of all interests concerned as is common in receivership cases, but that this receivership came under the class of cases that in equity become indispensable in order to enforce a lien against a corporation to execute the decrees of the court. That in ordering the receivership the court had in mind only to secure the orator in the payment of rent, its due, and to work that result in the shortest time practicable the Court declined to carry into effect the provision in the supplement of the lease of July, 1850, giving the orator the right to the possession and management of the roads on the failure to pay rent; that after two years under said receivership, the parties interested came together and the "compromise decree" was the result. Said consent decree involved no judicial determination or judgment as to substantial and effective provisions. "The parties enacted a code *ex contractu* for the administration of the property, and provided *ex contractu* that there should be the formality as of a decree supervening thereupon".

All the decrees thereafter were by consent and none of them required the exercise of original and independent judicial judgment on the part of the chancellor as is usual in adversary proceedings.

Judge Barrett held that by the provisions of the "compromise decree", the occasion and purpose for which the receivership was created, viz., the payment of rent

four months in arrears, ceased, for all such rent had been satisfied by funding it into new stock at 8 per cent. The "compromise decree" looked to the establishment of a continuing and permanent system of control and management for the benefit of all interests involved.

The decree in terms provided that the roads should be held indefinitely in the hands of the Court of Chancery. Previous to the "compromise decree" the Court was proceeding upon its judicial prerogative in the exercise of judicial judgment to realize its rent under the lease that after the "compromise decree" the position has been one of subordination to the agreement of the parties; that for any legitimate purpose the receivership could not be extended to the control and equipping of other roads or the building or buying of other roads, such as the Missisquoi and Rutland roads. It is fundamental in the law that a receivership is temporary, to serve an existing exigency of a temporary nature, and when that is done, it is to cease.

"The idea that a Court, in virtue of its prerogative in that behalf, is to take upon itself the office of instituting a receivership to be perpetual, and to do the duty of a court in controlling, directing, and enforcing the administration in the managemant of a business for the profit and emolument of the parties interested, and not to serve a present exigency, rendering it necessary in order to prevent a failure of legal justice and right, has not yet been propounded in any book on the subject, nor entertained and acted on in any case."

The Court pertinently inquires, and that is the real nub of this litigation, "Would the Vermont & Canada Railroad Company have consented to the Compromise Decree if they had forecast the possible result that the Court of Chancery might exercise the power of ordering

the sale of all the property to a third party to pay the expenses of administration under that decree, leaving the rent unpaid and unprovided for?"

We may also ask, would the first mortgage bondholders have done it with knowledge of such a provision? Would parties have taken various classes of equipment and guaranteed bonds purporting to be secured by specified property if they had thought this security might be appropriated to pay the expenses of administration?

Judge Barrett now comes down to the prayer of the bill that the entire property of the road of every name and nature be sold for the purpose of paying the expenses incurred by the management. On this point the Court goes out of its way to state its position which in later decisions has to be explained in a way that does not explain. The decision of the court in this case was that the receivership ended by "compromise decree"in 1864, that thereafter the receivers or parties in charge were simply the managing agents for the parties in interest and that the specific purpose for which the receivers were appointed having been accomplished before the issuance of equipment loans, etc., they were not at the time of the issue and negotiation of said loans strict receivers and such loans did not constitute receivers' debts or affect the rights of the Vermont and Canada Railroad Company and the first and second mortgage bondholders as to priority of payment and security.

Judge Barrett uses this language:

"It is plain that the Vermont & Canada Company, and mortgage bondholders of the Vermont Central Railroad Company, hold a position relative to the subject different from that of the creditors of the trust. The ground of right and claim of the former was the

lease of the one and the bonds and mortgages of the other. It was to render available the rights of each respectively that the compromise decree was made and went on in execution. The management and administration were subjugated to the legal incidents and consequences thereof; and we do not understand it to be controverted that the expenses properly incurred are to be paid before the beneficiaries of the trust are entitled to partake of the earnings. The contest has been against making such expenses a charge upon the corpus of the property, in priority to other rights and interests, in such a sense and manner as to render the sale asked for lawful and needful."

I also quote further from Judge Barrett:

"As to what is called the "floating debt", which rests upon the credit given to the trust management, the reason is not obvious why that debt should have precedence of any other of the trust debts,—trust debts, so distinguished from the claims of the Vermont & Canada Railroad Company and the Vermont Central bondholders. The secured trust debts were contracted in the carrying on of the business of the management, for the purposes contemplated and sought to be accomplished by the managers, just as the floating debt has been contracted, and for the same purpose. * * * What is now claimed is that debt shall have precedence of the other trust debts, making it first in right as to means of payment even to the appropriation of the security pledged for the payment of the other debts. There would be no warrant for this, even in case of a proper receivership."

The Court—after holding that the receivers as such were simply managing agents or trustees and that their primary relations were to and with the *cestuis que trust*

and their claim for outlay, services and expenses incurred were to be established and satisfied with reference to that relation and that in view of that relation there was no warrant of law for ordering the sale of the property for the purpose of discharging the debt created by such management—closes his opinion as follows:

"However we may personally regret that the enterprise put on foot by the decree of 1864, as it has gone on, has failed in proposed and expected results, and that embarrassments are serious, and complications are as yet unsolved by any means that have been attempted, it does not behoove the Court, for the purpose of making "an end all" of this hydra of contention, bitterness, loss and litigation, to pronounce as law what is not law—to adopt and authorize measures not known to or warranted by the law in such a case."

It will be seen that these were the measures that were afterwards adopted. This opinion of Judge Barrett was the subject of great criticism as being involved in its reasoning and illogical in its conclusion, and the Supreme Court thereafter spent considerable time in attempting to explain this opinion and to reconcile it with the subsequent opinions in order to come within the doctrine of "*stare decisis*". Inasmuch as the petition was dismissed this was for the time being a victory for the Vermont & Canada Railroad Company and the first and second mortgage bondholders.

This case which had been before the Court since 1855 next came before the Court in the form of a bill brought in the name and behalf of the Central Vermont Railroad Company, James R. Langdon and other bondholders, against the Vermont Central and Vermont & Canada Railroad Companies, trustees of the first and second mortgages of the Vermont Central Railroad and others,

and this bill was brought in the nature of a supplemental bill to the original bill.

The cause came on for hearing at the September Term, 1878, of the Franklin County Court of Chancery January 4th, 1879. The bill was dismissed *pro forma* and without prejudice and was ordered for argument before the full bench at the January Term in October, 1879.

The prayer of the bill was substantially the same as the prayer of the preceding petition filed in the old cause to which we have just referred. The orator prayed that the accounts of the Central Vermont Railroad company, as receiver and manager, since the first day of July, 1873, may be adjusted and the amount due be ascertained; that the holders of the notes secured by the pledge of specific property may have the amount of such security ascertained and appropriated to their payment and after the application of such security the balance due, together with the funding and floating debt, may be decreed to be a first lien or charge against the said roads and their property and the income thereof prior in right to any claim of the Vermont & Canada Railroad Company or the bondholders under the first and second mortgages of the Vermont Central Railroad. That some time be fixed for the payment of said claims and in default that the property be sold to pay them. The Vermont & Canada Company in its answer claimed to be entitled to its rents out of the gross income of the property; that its claim in equity was superior to the claims of all other creditors and that it had never assented to, ratified or acquiesced in any arrangement, order or decree by which its claim was waived or postponed. The counsel for the orators were Luke P. Poland and B. F. Fifield; for the Vermont & Canada Railroad Company Aldace F. Walker and E. J. Phelps. The

opinion was written by his Honor, Homer E. Royce, and is found in Volume 53, pages 236-278 of the Vermont Reports.

Judge Barrett, who had written the former opinions, had failed of re-election at the hands of the legislature in 1880, and was succeeeed by Hon. Russell S. Taft.

Judge Royce's opinion, handed down December 14th, 1880, is most able and sound and a student of the situation can see no reason why that same opinion was not handed down in October, 1877, when the very same questions were in issue. Judge Royce in his opinion reviews in a most succinct manner the history of the litigation from its beginning, calling attention to the compromise decree of 1864 which was made subject to the approval of the stockholders of the Vermont & Canada Railroad Company and also in accordance with the act of the legislature of the State approved November 4th, 1863, which authorized the Vermont & Canada Railroad Company to convert its back rent into stock and to increase its capital stock for that purpose, and that on the 5th day of November 1863, the stockholders of said railroad approved and accepted the terms of the agreement; that from time to time orders were made by the Court on notice to all parties in interest and without objection, authorizing the receivers to raise funds for the erection of depots, shops and other necessary expenses incurred in the running of the roads; that about $6,000,000. of receivers' bonds had been issued under such decrees and that such bonds were all outstanding and default in the payment of interest on them was made November, 1876; that the Vermont & Canada Railroad Company by its directors appointed a committee to act in conjunction with the advisory committee of the Vermont Central bondholders

which said committee, on the 24th or February, 1870, entered into a contract with the Ogdensburg & Lake Champlain Railroad Company for a lease of its road for a term of twenty years. The Rutland Railroad was also leased on the approval of the directors of the Vermont & Canada Railroad Company. In the original case—the only one in fact— the Vermont Central Railroad Company and the trustees under both mortgages were made defendants and in the decree provision was made for the appointment of the advisory committee to represent the interests of the first mortgage bondholders. Down to the compromise decree of 1864 they had no voice in the management, but thereafter the advisory committee was appointed to protect the interests of the first mortgage bondholders. The receivers and managers were not discharged by the Court until the appointment of the Central Vermont Railroad Company as receiver in 1873 and no attempt had been made to have them discharged by any one interested in the property. They were recognized as receivers and managers by all parties in interest, by the Legislature and the Courts. Purchasers of the bonds relied upon the apparent authority of the receivers and managers to issue them and upon the security that said obligations originally gave.

The question for determination is— Which has the superior equity, such purchasers or the mortgage bondholders?

I quote from Judge Royce's opinion:—

"It is claimed that the persons claiming to be receivers and managers were not strict receivers and hence that the obligations which they gave cannot in a court of equity be treated as receivers' debts; but in our judgment it is immaterial whther they were strict receivers

or not. The bondholders suffered them to appear to be receivers, and to issue negotiable bonds as such, and where one of two innocent parties must suffer by the act of a third, he who gave the power or opportunity to do the act must bear the burden of the consequences. If there was any defect of authority on the part of the receivers, the acquiescence of the bondholders in what has been done by them is as effectual as the most formal authorization in advance, or ratification afterwards, would have been."

And so the Court held that as between the *bona fide* holders of the bonds issued and negotiated by the receivers under orders and decrees of the Court and the mortgage bondholders the former had the superior right. The more difficult question was to determine the status of the stockholders of the Vermont & Canada Railroad Company. The contention of the Vermont & Canada Railroad Company was that the accounts of the receivers for purchases of equipment, etc., evidenced by different kinds of securities, had not priority over the claim of the Vermont & Canada Railroad Company for rent.

E. J. Phelps made an able argument on this question at the October Term, 1877, of the Supreme Court, and this is the only one of his forensic arguments to be found in his memoirs.

Mr. Phelps vigorously comments in his argument upon the fact that the Vermont Central Road and the receivers came into possession as opponents of the Vermont & Canada Railroad Company, which was defeated in its struggle for possession, and that they had the right to stay as long as they paid rent and the sole power of interference which the Vermont & Canada had was in order to get their rent. He scouted the idea that

they were the agents in any way of the Vermont & Canada so as to charge the Vermont & Canada for debts incurred.

He says:—

"What is a lien? Or, as my friends from Boston—who are better authority— call it, a 'lion'? And there is great propriety in that pronunciation in this case, as it is now going about 'seeking whom it may devour'. What is a lien? A lien is a claim upon real estate that you dare not attempt to assert in any other words. That is what it is. When you have got a claim upon a man's real estate that you dare not assert in any other language, lest the words you use refute your claim, it is a lien. And when you have expunged from this case, as I said before, about four or five words of its distinctive nomenclature, you have brought this controversy to an end, or rather it becomes like those theological controversies that never come to an end because the terms that the opponents use have no definite meaning; so they palaver against each other to the end of time without producing any effect. And if we could only expunge from this case the terms 'lien' and 'estoppel' my friends would be dumb for want of language to express their ideas. * * *

"Well, now, what is an 'equitable estoppel'? I never heard before of an 'equitable estoppel' that differs from a legal estoppel. What an estoppel is that is available in equity that cannot be available at law in a controversy that raised the question, I should be glad to know. 'Equitable Estoppel' means probably an estoppel that is not made out. That is the idea generally. Estoppel? Estoppel as to what? What has this corporation done? What has it declared? What has it said? If there is no contract for any such lien, if it is to be derived by parol, and not even by a direct declar-

ation, but by a collateral declaration, then arises an estate by equitable estoppel, a term that is enough to bring Lord Coke out of his grave to make a fresh onslaught on the Courts of Chancery."

He argued that so long as the rent was paid it made no difference whether the Vermont & Canada assented or objected and this was the condition up to the time the Central Vermont took possession: that there was nothing that the Canada voted or said or did from the time of the compromise decree down to 1872 which "raises the scintilla of that reasonable doubt on which assassins are acquitted, on the question whether that corporation in any way known to the law, ever assented to the proposition that money so borrowed should be a mortgage upon their separate estate which should make it chargeable for the payment".

He compared this to the case of an ordinary administrator who takes an estate hampered by mortgages and carries on the business of the estate, and claimed that in that case prior mortgages would have precedence over any accounts of the administrator.

The Court disposed of this contention on the following grounds which are known as "equitable estoppel" or "*estoppel en pais*".

"The Vermont & Canada Railroad Company and its stockholders with knowledge that the receivers and managers were acting as such and were claiming to be their receivers and issuing negotiable obligations as such remained passive and gave no note of warning to parties who were liable to be deceived by such appearances nor did they put on record a single fact that might have led to the discovery that the obligations thus issued were being issued without legal authority. The rights and liabilities are not dependent upon the

rules of law governing strict receiverships. The Vermont & Canada Railroad Company has so conducted itself that it is estopped from denying that the acts of the receivers are binding as such and so the *bona fide* holders of the bonds issued by the receivers have a prior claim and superior right to the claim of the Vermont & Canada Railroad Company for rent and the holders of said bonds, after the special security pledged for their payment has been applied, are entitled to have the property of the two roads or their income appropriated to pay what may then remain due on the sale."

Judge Royce recognized the hardship of this ruling in the followong language:—

"There is a seeming hardship in applying the rule to the Vermont & Canada Railroad Company. That company in the first instance, had no futher interest in the improvement or conservation of the property, than that it should be in a position to earn net income with which to pay its rent. It might well have remained passive as long as that rent was paid, and it was the right of the Vermont & Canada Railroad Company to apply to the Court to enforce the remedy provided for in the contract of 1850, when the rent should be in arrear. When the receivers, who were appointed upon its application, had executed their duty by paying the rent in arrear, it was the right and duty of the Vermont & Canada Railroad Company to see to it that they were discharged, if it would avoid the consequences that might result from their longer continuing to exercise the duties of receivers and to appear ostensibly as its receivers. From what was done by the Vermont & Canada Railroad Company in participating in the issue of the bonds by the receivers and managers, the parties who purchased them no doubt understood, and had the

right to understand, that they were purchasing paper that the receivers and managers had the lawful authority to issue as such, and that the Vermont & Canada Railroad Company recognized them as its receivers."

The Court also held that in case the securities pledged for the different issues of bonds were not sufficient for the same the bondholders were not limited to such securities, but that after the application of the securities pledged for the payment of each class of bonds, said classes of bonds stood upon the same common right and upon perfect equality with the floating bonds in the matter of exacting payment.

In Judge Barrett's opinion in the 50th Vt. the question of whether or not the holders of said bonds were limited to their securities as the only resource of compelling payment was left undecided. This Court held as a matter of law that the question of whether or not the taking of a special security is in law a waiver of all other securities is to be determined by the understanding of the parties at the time of the making of the promise and giving of the security.

I quote further from Judge Royce's opinion:—

"We have not been much aided by precedents in the determination of the questions involved in this controversy. We have not discovered any case so analogous to this in its facts as to be authoritative, but in this decision we have endeavored to follow and be guided by those familiar principles of equity law that are universally applied in the determination and enforcement of equitable rights. We do not intend by what is now held to overrule the decision made by this Court in Vermont & Canada Railroad Co. vs. Vermont Central Railroad Company, *et al*, 50 Vt. 500. The opinion in that case defines the equitable rights of the parties sub-

stantially as they are now determined. We have built upon the foundation there laid. It is expected that what is now decided may result in the apportionment and distribution of the property in litigation, or the avails thereof, among those entitled to it, and by placing it under their own control to get rid of the disastrous litigation that has lain like a nightmare on the property for so many years.

And in view of the criticisms that have been made upon the actions of the different chancellors who have made or approved the orders and decrees which, it is claimed, have resulted in such disaster to the property; it is but an act of justice to say that there is not one of them that authorized the incurring of any pecuniary liability, or the making of any contracts that have resulted in a loss, to which the parties in interest had not given assent, or failed to make any objection to, after having notice and opportunity to do so. In making such orders and decrees there was no occasion for the exercise of judgment. It was the method devised and agreed upon by the parties to give what it was then understood should be a judicial sanction to acts and agreements of the parties; and the Court has never been called upon to interfere by direction or advice in the management or control of the property."

The Court then dismissed the *pro forma* decree of the Court of Chancery, dismissing the bill in this case, and the cause was remanded to be referred to masters to ascertain the amount due to the respective parties in interest and for the distribution of the assets in accordance with the rights of the different parties as stated in the opinion.

The Court in its opinion says it does not intend to overrule the former decision in the 50th Vt.

In law a man is presumed to intend the natural con-

sequences of his act. This definition of intent, judicially determined, must apply to the Court itself.

It is difficult certainly to harmonize the two decisions and Judge Barrett, as will be seen later, does not attempt it. It would be most indelicate in me especially in this presence, to criticise our Court of last resort, and I do not intend to. The Bar of Vermont have always held in highest esteem and been justly proud of her judiciary. And what I say will apply in general to our higher courts.

To err is human: to admit the error is almost divine. Where there has been a clear change of front it would seem to the humble practitioner the better way to say so rather than by involved and intricate reasoning to attempt to reconcile the irreconcilable. The only way that the Court could consistently say that the former decision of Judge Barrett was not over-ruled was to treat substantially all of it as *obiter dicta*. Judge Barrett, as has been stated, was not on the bench when this opinion was handed down, and the reporter published a re-draft of an opinion made by Judge Barrett and furnished to Judge Royce before his term of office expired. That opinion of Judge Barrett's is published in the 53rd Vt. immediately following the opinion of Judge Royce and would be regarded as a dissenting opinion had Judge Barrett been upon the bench at the time.

I quote at some length from Judge Barrett's opinion as it states clearly the position of the Court in 1877 and is a clear answer to Judge Royce's claim that the two decisions are in harmony.

"It was in that case decided that after the compromise decree there had been no receivership created and administered by the Court, but only a contract management, under the control of the parties in interest.

It should not now be held otherwise, nor should this case be disposed of on any different ground. It should be considered and disposed of as one in which the holding and management, after the compromise decree, went on by the agreement of the parties, down to the accession of the Central Vermont Railroad Company and not by the control and order of the Court.

* * * *

The Central Vermont Company came in upon its own asking and the asking of the persons who had held the management down to that time and who were largely the stockholders and officers of that company. It came in under the compromise decree, not with the consent of the parties to that decree, but against the will, and wish, and the objection of said parties. Those persons theretofore holding the management did not represent the parties and interests for whose behoof they held their position under the compromise decree, in asking to be supplanted by the Central Vermont Company.

To do so was outside their official prerogative, and in violation of their fiduciary right and duty. * * * *

Said Central Vermont Company is not entitled to set up any claim against said property or the earnings in prejudice to the rights of said parties to their rents, and to the interest and principal on their bonds. * * * The property is in the hands of said company charged with the first duty to realize income, and pay said rent, and bonds, and interest, and with no right to make outlays beyond what is just named, and charge the same on said income, or on the corpus of the property.

* * * *

The claim and right of the Vermont & Canada Company is for rent, and not for the possession, as owner

of either of the roads. The Central Vermont Company holds subject to those rights, and only by answering to them should it be permitted to hold.

There is no floating debt accrued since the Central Vermont took possession, to which the Vermont & Canada or the mortgage bondholders should be subjected or postponed. They cannot properly be subjected to or affected by any floating debt, unless for what accrued while they were parties to the management under the compromise decree, and prior to the time the Central Vermont took possession. * * *

This is an extraordinary case, both in the history of its origin and progress, and in the vastness and complication of the interests involved.

The Vermont Central Railroad Company and its mortgagees owned its road, and they have not parted with their title. It had a perpetual lease of the Vermont & Canada Railroad, giving the right to possession and use, subject to the payment of the stipulated rent. Rent getting in arrear, the property went into the hands of the receivers of the court whereof to make income by use and pay the rent. Afterwards, by arrangement, it went into the hands of fiduciary managers in the interest only of the primary parties, for the purpose, by use, to realize income with which to pay said rent, and also the interest and principal of the mortgage bonds, professedly for that purpose, the possession and management was held down to the accession of the Central Vermont Company in 1873, professedly for that purpose, said company took possession, in succession to the managers, under the compromise decree upon the joint petition of said company and said managers, and against the will and objection of the legitimate and primary parties. * * * The party in possession

has gone on the same as if absolute owner of the property, building and enlarging depots, laying steel rails, running and equipping and helping in the construction of other roads, receiving and disbursing the receipts and proceeds, as if absolute owner of the property, without duty, accountability or liability to anybody else. And now said party in possession viz., the Central Vermont Railroad Company, with the persons constituting said company, and divers persons having a community of interest in the result asked, is in Court, asking of the stewardship which has been exercised over the property, that a decree may be made that will necessarily divest the original parties of their title to the property, and their rights in the use and income of it, without the payment of accrued arrears of rent or of interest, or the principal of said bonds, and without resource for the payment of anything on the score of rent or mortgage bonds in the future.

Such a history and such an asking are without a parallel. Such a result, outside of the court that shall decree it, cannot without difficulty be comprehended and appreciated as a legitimate result, obtained by a correct application and just administration of the law governing, defining and enforcing the right, duties and liabilities of the respective parties and interests involved."

Judge Barrett in closing uses this language:—

"I close by repeating, the Vermont & Canada Company has not given up its rights as owner and lessor. The mortgage bondholders have not given up their rights under their mortgages.

The title to the property is in the Vermont Central Railroad Company, subject to the rights of the Vermont & Canada Company, and said mortgage bondholders. The original trustees and managers under the compro-

mise decree had only the possession in trust. The Central Vermont Company has possession only in trust. Its position is trusteeship for the behoof of the Vermont & Canada Company and of said mortgage bondholders, whether it obtained and holds the possession rightfully, or without lawful right."

Judge Barrett throws a side light on the inside workings of the Court in this language:

"In view of what was said by myself and the other judges, when in our last consultation I called attention to what was said in an article signed "A Boston Lawyer" printed in the "Boston Daily Globe" of December 26th, 1877, and afterwards reprinted in other papers, copies of which were sent to me; viz: 'That the entire Supreme bench, with the exception of its author, very much regret its' (the opinion delivered by me in October, 1877) 'delivery in such form, and would be very glad to recall and revise it, if that were possible.' I urge and expect that in the opinion to be drawn up by you, it should be distinctly stated that the judges constituting the Court that made the decision in October, 1877, still hold views embraced in that opinion.

I have been many times told that the sentiment of the above, from the article in the "Globe" has been often and sharply expressed by representative men who were not satisfied with that deciseon."

This case came up again for hearing before the Supreme Court, full bench, at Montpelier in May, 1882, which was essentially the third hearing in the same cause. Special masters had made reports as to the condition of the floating debt, bonds, etc. and Judge Redfield rendered an opinion which is found in 54 Vt. pages 597–616.

He opens his opinion:

"This case in essence and principle, comes now before

the Court for the third time; but has been presented and treated during the argument as if nothing yet had been decided, and nothing done by the Court. It is certain that many words have been spoken by the Court, many pages printed."

The main question involved in this opinion was what property could be charged with the expenses of the receivership created by the Court in 1861. It was contended on the one side that this equitable charge could be made upon the corpus, or as E. J. Phelps facetiously remarked "corpse" of the property, and on the other side that the charge could only be made upon the income as provided by the lease.

Judge Redfield in his opinion calls attention to the fact that this equitable charge did not arise out of contract, but solely from the act of the Court of equity, The Court "lays its judicial hand upon the property" and so controls and administers it. The two roads, each having its corporate franchise, bound by mutual covenant, became one road. The Vermont Central was the owner of the whole line, including the two roads subject to the rights of the mortgage bondholders and the rent claim of the Vermont & Canada Railroad. The property of the Vermont & Canada was a leasehold estate. It is immaterial whether they were strictly managing agents of the primary parties or the agents and officers of the Court. They had enlarged the scope of administration accorded to them by the Court at the request of all parties in interest. Whether as trustees by agreement or receivers, the managers had the inherent right to be reimbursed for all expenses which they reasonably incurred in the execution of the trust. This being so and expenses of administration having a priority over the application of income to the payment of rent, it

follows, as a matter of course, that such precedence must postpone the application of income to rent until such debts so incurred were fully paid, and if such trust debts were more than the value of this leasehold estate, then the title of such leasehold estate is extinguished. A leasehold estate in land may be appraised and set off on execution to await the debt of the creditor like other property. If the debt is more than the appraised value of the leasehold estate, then the whole estate must be set off for the creditor.

The Court says:

"If the creditor may rightfully absorb the Canada, then the estate of the Canada correspondingly ceases to be of value, and all benefit of it or in it is transferred to the creditor; and is there any technical dogma in a Court of Equity that would require a perpetual trust administration of railroads, in order to work out the same result that otherwise might be speedily done by making the equitable charge "redeemable" and foreclosure?

To the claim on behalf of the Canada that this will sweep away its entire property, the court answered that neither company could get its road out of the possession of the court without paying the receivers' debt, and the Court, if the debt is not paid, must enforce the lien which the law gives for such debt upon the property in its possession. That such a result is often involved in enterprises of this sort, the Court points out in this language:—

"Nor do we think it strange that such property voluntarily "pooled" and put to hazard in an enterprise requiring great outlay and the creation of immense debts, should be overwhelmed in bankruptcy, and finally lost. Such is a common fate."

The Court held that the good faith of the managers could not be impugned. The rent of the Canada road had become largely increased by the issue of new stock up to $3,000,000. and a large outlay for new equipment and the leasing of their road to avoid ruinous competition was necessary. The Court then makes an abortive attempt, as did Judge Royce, to reconcile this opinion with the 50th Vt. That the form of expression in the opinion in the 50th Vt. was not all that could be desired may be inferred from this language in Judge Redfield's opinion.

"The form of expression, the order and method of illustration in reasoning upon a legal proposition, must necessarily be that of the judge who draws up the opinion."

To the argument that the decree of 1864 was simply a compromise decree and no more binding than a mere contract of the parties the Court forcibly answers that if parties are properly impleaded and consent to a decree that decree is as conclusive upon the parties "as if the litigants had wrangled over it for a life time."

The claim that other property, alien to the trust, had become incorporated into the decree of 1864 which therefore had not the judicial quality of a decree, is not supported, because the construction of the road to its proper limits introduced no new or alien property.

I quote Judge Redfield:—

"The claim that by some mysterious alchemy, the judicial hold upon the property by the Court had become loosed, and the property sent adrift, out of Court, "unhouselled"and without a reckoning, for some error of procedure or of administration, has no legal foundation."

"It would be a caricature upon the jurisprudence to hold that property, lawfully in the possession of the

Court by its receivers, had, without the knowledge of the Court or the parties on interest, so drifted out of the jurisdiction of the court, that now rights of property in the subject of such receivership can only be settled by wreckers in the scramble for salvage."

The final decision then of this litigation is that the entire control and possession of the railroad property put into the custody of the receivers and managers in 1861 has been judicial and by the consent and agreement of the owners of the property. That the Central Vermont Railroad Company were receivers and managers from 1873 under orders and decrees of the court. That the debts legitimately incurred by the managers constituted an equitable lien and charge in the nature of a mortgage upon the whole property which is the subject of the trust and that such mortgage even embraces the franchises of the road.

Throughout this unprecedented litigation, abounding in legal complexities, two figures stand out in bold relief—the one receiver and manager, John Gregory Smith; the other, leading counsel for the receivers, Benjamin F. Fifield. Vermont has never produced a man more diplomatic and forceful than John Gregory Smith. In this entire litigation from the time he succeeded his father, John Smith, he was the leading spirit, his was the controlling will, his, the master mind, his, the guiding hand. In all those bitter conflicts involving vast sums of money and entailing complete loss upon all those who originally subscribed, he was "*facile princeps*" with no second. Of fine, commanding presence, though not tall of stature, possessing a personal magnetism seldom equalled, he was a born leader of men.

Of indomitable will, of dauntless courage in the face of obstacles seemingly insurmountable, he conbined in rare measure and proportion the "*suaviter in modo*" and the "*fortiter in re*". He was justly popular. Every one knew that within the man of iron there was the large heart.

He was a strong and vigorous man whose sympathies were as a child's, in whose veins coursed warm, red blood, and whose brain was teeming with far-reaching plans for a greater and better Vermont. To every such Vermonter, now and alway, let us say, "All Hail!"

While throughout his being he was informed with a tireless energy and a resistless will, while he was seldom swerved from a fixed purpose, he never failed to show his gentler, sweeter nature and had always at his command the soft answer that turneth away wrath. Seldom are combined in the same man the dogged persistence of a Washington with the manners and diplomacy of a Chesterfield. When Gov. Smith and Hon. E. J. Phelps would meet after, for instance, Mr. Phelps, with his caustic wit, had flayed the Governor in a legal argument, and when each was eager to show, the one that the arrow was not poisoned and the other that it had failed to reach the mark, any Vermonter might have pointed to the pair with pride and said: "Match them in the country for resourcefulness of brain and courtliness of manner."

The railway projects of Gov. Smith were doomed to failure from their inception.

No one knew this so well as he and no one concealed that knowledge so skilfully. But he also knew with his far-seeing vision that he was building for all time. He was the pioneer and was blazing the way.

He knew not and probably cared little who built on the foundations he laid. While beset and bewildered

by all sorts of financial problems which would have discouraged a less resolute and resourceful man, he had the philosopher's complacency that what he had done he had done well and future generations would rise up to call him blessed.. To such a man, at such a task, there is no such word as failure.

With a less intrepid leader, Vermont would have been much later in exchanging her stage-coach for the iron-horse. Some one should write a life of Gov. John Gregory Smith and it would be but a history of Vermont during his time. It would read like a romance and it would thrill every Vermonter and fill him with pride for his sterling manhood and inspire him with new hope and courage for the future.

In those days there was a great deal of scandal about the third house in the legislature and his influence upon it and there was also talk that the judiciary could not resist the spell of his enchantmant, but there can be no question, looking at this without the passion that prevailed at that time, that the judiciary were above reproach. In fact almost all the important questions finally decided by our Court in that litigation have since received the sanction of the United States Supreme Court, and the main point that receivers' certificates have priority over underlying bonds is now recognized law. It is little wonder in this mighty struggle to make a greater Vermont, begun in those trying times when there was little traffic upon which to build a railroad, Gov. Smith had the sympathy of his fellow-Vermonters in the struggle.

But Gov. Smith was not alone in this struggle .

Ever at his right hand and subject to a call that was insistent and continuous, was his leading counsel and confidential friend, Benjamin F. Fifield of Montpelier.

Throughout this legal battle Mr. Fifield was to Gov. Smith what a pilot is to a ship. Gov. Smith knew where he wanted to go. His counsel, with marvellous skill and accuracy, pointed out the way. No important step was taken without Mr. Fifield's advice and guidance.

While he had associated with him eminent counsel, the best in the State, Mr. Fifield was leading counsel in every sense of the word and bore throughout the "burden and heat of the day".

The litigation broke out in Massachusetts and New York and every device that legal skill could conjure up was resorted to to oust the State Court of jurisdiction and remove the cause to the United States Courts, all to no purpose. A large number of equity suits were instituted in the United States Circuit Courts which required on the part of Mr. Fifield in the defense a complete mastery of equity principles and the procedure in the State and Federal Courts.

Ex-Gov. John W. Stewart says of Mr. Fifield:

"Without loss of logical precision, in the white heat of discussion, he would focalize his argument upon the point in hand with a wealth of legal illustration and amplification until it became fairly luminous."

Mr. Fifield obtained for his clients in this protracted litigation a substantial victory upon all the main points and kept them in control of the roads until the end. And what a training school was this railroad jurisprudence!

Throughout his legal career, Mr. Fifield has been in Vermont, the railroad lawyer *par excellence*.

The days of railroad litigation of this magnitude are passed in Vermont. No more will the lawyers throughout the State fatten their bank accounts with large

railroad retainers. During this litigation the leading lawyers of the State were retained upon one side or the other.

The railroads now are parts of large systems, and the chief attorneys are outside of the State and the principal cases are negligence cases. Free passes and general retainers we can spare without a tear.

I have endeavored to sketch the outline of this wonderful and unique railroad litigation. What the future has in store no one can prophesy. No part of the country depends more upon her railroads than does Vermont, and in fact all of New England. The cost and maintenance of railroads in New England is a far different problem than it is in the prairie states of the west like Iowa and Kansas. Tunnels and bridges are expensive both to build and to maintain and more coal is required to carry freight up, and down grades and the tonnage is of necessity lighter.

New England is essentially a manufacturing center. We have no mines, no large areas of fertile soil, no coal and no iron. We go south for our cotton, to the middle States for our iron and coal and west for our leather and foodstuffs. Our raw materials we bring in from abroad. Under a system of railroad competition and the competition between railways and water-ways New England has built up her immense industries. This country has enjoyed its marvelous industrial development in great measure on account of the lack of restraint upon the railroads and the freedom to respond to the natural play of economic forces. Gross abuses in favoritism and rate-making have naturally followed.

That the evils which have been so forcefully exposed recently may be remedied and the remedy prove not worse than the disease, that the industries which have

been fostered by the railroads in their desire to create traffic may not languish and die, and that as in the past the railroads may have a reasonably free hand, without discrimination between persons or localities, to build up waste-places and continue the unexampled prosperity of our country without let or hindrance, is the desire of every true American citizen.